COMMENT.

The Supreme Court of New York recently rendered a decision interesting in that it involves the restraint of liberty as applied to a somewhat novel statement of facts (*City of Buffalo* v. *Collins*, 57 N. Y. Sup. 347). The case involved the validity of an ordinance of the City of Buffalo regulating the *weight* of a loaf of baker's bread. The court *held* such an ordinance unconstitutional, not to come within the police power of a State, but to be an invasion of the right of an individual to engage in a lawful business, and, therefore, a restraint of liberty within the meaning of the decision in the *Slaughter House Cases* (16 Wall 87), and *People* v. *Gillson* (17 N. E. 345), where Judge Peckham said: "Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." There was no question of an attempt to deceive by false weights in the present case, nor any question as to quality of the bread, but simply the validity of an otherwise proper ordinance, which attempted to prohibit the making of loaves of bread of less than one and one-half pounds each, and the court apparently had very little trouble in reaching the above conclusion.

The case of *Boutwell et al* v. *Marr et al.*, 42 Atl. 607 (Vt.), furnishes an excellent illustration of a recent development of the law of civil conspiracy. In that case an association of granite manufacturers organized for the purpose of boycotting plaintiffs, and to that end, by a by-law primarily affecting plaintiffs, imposed a fine of $50 on any of its members who carried on business with one not a member, was held liable to plaintiffs for actual damages occasioned by the enforcement of such by-law.

In the opinion of the court may be discovered a new view of the relations of trade and labor combinations to third parties, which, if followed in similar cases in other States, will go far towards checking the power of combination, both of capital and labor.

For some time certain courts in the United States have recognized the doctrine that an act, entirely lawful if done by one man, or by several men not combined together, may become unlawful, "if done in pursuance of a combination of individuals to do the same act" (*Cooke on Trade and Labor Combinations*, 14; *Toledo & C. Ry. Co.* v. *Penna. Co.*, 54. Fed. 730; *Moses* v. *Bricklayers' Union*, 7 Ry. & Corp., C. J. 108; *Curran* v. *Galen*, 152 N. Y. 33). This joint action being unlawful, the means of attaining the purpose of the combination would be unlawful, and an action for civil conspiracy would lie, in which, unlike criminal conspirary, it has become well settled that illegal means must be used and damage ensue before there can be a cause of action, and that the use of legal means with an unlawful intent will not suffice. This question of intent is conclusively settled in England in the recent case of *Allen* v. *Flood*, L. R. App. Cor. (1898), where the court said: "The existence of a bad motive in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due." This doctrine that an act, lawful if done by one, becomes unlawful if done by many

—a combination—has been distinctly denied in England (*Kearney* v. *Lloyd*, 26 L. R. (Ireland) 268; and in *Huttley* v. *Simmons*, 1 L. R. Q. B. (1898, 181), and has been fiercely attacked in the United States as well (*Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223, 234; *Macauley* v. *Tiernay*, 19 R. I., 255; *Clensmit* v. *Watsay*, 14 Ind. App. 38). Indeed it is hard to see why an act, lawful in itself, should become unlawful simply because of a combination of men to perform it, *so long as they all do it of their own free will.* The touchstone, according to Cooke on Trade and Labor Combinations, would seem to be "whether the act is a natural incident or outgrowth of the relation of trade competition." If it be so, the fact that it is done by a combination of men is immaterial, and also the question of the *motive* of that combination. Cf. *Mogul S. S. Co.* v. *McGregor et. al.*, L. R. App. Cor. 25, 1892, in which a combination of traders to injure a rival company by offering lower rates was held to be perfectly legal. "Intent" and "combination" being no longer serviceable in controlling the legality of these organizations, it has become necessary to adopt another basis of attack, that used in the case under comment. Clearly if an action is to lie at all, it must be because of the use of illegal means in carrying out the designs of the combination. In *Boutwell* v. *Marr*, the acts done are pronounced illegal because amounting to intimidation and compulsion. In other words it simply becomes a question whether or not there is coercion in the acts of the defendants. The Vermont court maintains that, because of the fine imposed upon all members who deal with persons not members of the association, there is a coercion by the majority who put the measure through, of the minority who opposed it. The court says:

"Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body in matters involving the rights of outside parties is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats of intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is produced by coercion. The jury could properly infer from the nature of the organization that their united action was due in part to the means adopted to secure it."

At once the objection is suggested that this subjection to fines and penalties has only been brought about by the voluntary acts of the outvoted minority in joining the association in the first place. But the court goes on to say: "The voluntary acceptance of by-laws by members of an association, providing for the imposition of coercive fines for the violation of the association's rules, does not remove the fact of their coerciveness. The law cannot be compelled by any mutual agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The law sees in membership of an association of this character, both the authors of its coercive system and the victims of its unlawful pressure."

Besides coercion of members after they join the combination, the court discovers in the means adopted to carry out the purposes of the organization, evidence that *membership itself* is due to coercion, for it says: "It can hardly be supposed that the defendant's organization reached its present proportions without some previous use of the methods disclosed by the evidence above cited. And as far as its membership was due to coercion, there was a further element of unlawful pressure in the enforcement of the mutual action against the plaintiff."

This case is important, then, as calling attention to possible coercion and intimidation that lies deeper than the surface. The courts must discover whether or not these combinations exert an element of unlawful pressure in the enforcement of the united action.